United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-1145

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

:

-against-

:

Docket No. 75-1145

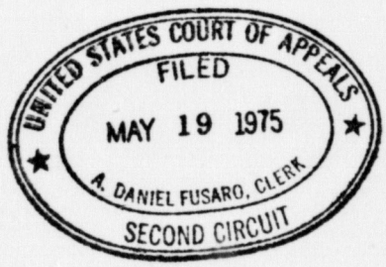
CARLOS PEREZ, a/k/a "Charlie," a/k/a "Fernando," :

:

Defendant-Appellant. :

----------X

APPENDIX FOR APPELLANT



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Attorney for Defendant-Appellant, PEREZ

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PAGINATION AS IN ORIGINAL COPY

DOCKET

JUDGE STEWART

74 CRIM. 1045

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:* John P. Flannery, II-AUSA
vs.	
AURORA LABOY, a/k/a "Cookie"	
CARLOS PEREZ, a/k/a Charlie, a/k/a Fernando	*For Defendant:*

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED					
			DATE	NAME	RECEIVED		DISBURSED	
07)								
Fine,								
Clerk,								
Marshal,								
Attorney,								
Commissioner's Court,								
Witnesses,								
1:812,841(a)(1),(b).								
istr.' & possess. w/intent to distr.								
ocaine,II.								
(One Count)								

DATE	PROCEEDINGS
1-7-74	Filed indictment.
1-11-74	Deft. Perez(atty. present) Pleads not guilty. Motions returnable in 10 days. Deft. continued remanded in lieu of bail fixed by Mag. at $5000PRB secured by $1,000. cash or surety. Case assigned to Judge Stewart for all purposes. Cannella,J.
1-18-74	LABOY - Deft. appears (atty.present) pleads NOT GUILTY. Ten days for motions. Bail continued as previously fixed by the Magistrate at $5,000. P.R.P.secured by $500 Cash TYLER,J.

	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
	CARLO PEREZ - Interpreter Maria Cardenas present. Defts. application for reduction of bail denied - STEWART,J.		
-16-75	Filed govts. notice of readiness for trial.		
-06-75	Filed defts. affdt. and notice of motion for dismiasal of indictment,etc ret. on date to be fixed byour court.		
-26-75	BOTH DEFTS'- Audibility hearing held - Trial set for ? 27-75 at 10 AM - Interpreter sworn.		
-27 75	BOTH DEFTS' Motion to suppress denied. Trial begun before Stewart, J. (JURY) and adj. to 3 4-75		
3 04 75	Trial continued		
3-05-75	Trial continued		
3-06-75	Trial continued and concluded- Jury Verdict: BOTH DEFENDANTS GUILTY as charged. P.S I ordered. Sentence adj. to 4-2-75 at 9:30 AM		
	PEREZ- Bail continued		
	LABOY- Bail set in the sum of $10,000 cash or surety. Laboy remanded in lieu of bail. -- Stewart, J.		
April-75	*Filed Transcript of record of proceedings, dated* Feb 27, March 4, 5, 6, 19		
04-02-75	AURORA LABOY--Filed JUDGMENT(atty. Alan Salzman,present)--the deft. is hereby committed to the custoy of the Atty. General or his authorize representative ~~for imprisonment for a period of TWO~~(2) YEARS. Pursu to Title 21, Section 841, USC,deft. is placed on Special Parole for period of THREE(3) YEARS to commence upon expiration of confinement. ~~Stewart,J. (copies issued)~~		
04-02-75	CARLOS PEREZ--Filed JUDGMENT(atty. Howard Jacobs,present)--the deft. is committed to the custody of the Atty.General or his authorized representative for imprisonment for a period of THREE(3) YEARS. Purs to the provisionso f Section 841 of Title 21, USC,deft. is placed on S Parole for a period of THREE(3) YEARS, to commence upon expiration of confinement. ~~The court orders commitment to the custody of the Atty.~~ General and recommends that deft. be incarcerated at the Federal Correctinal Institute at Lexington, Kentucky where deft. may continue ~~his study of draftsmanship. Stewart,J.(copies issued)~~		
	(see pg. 3)		

Docket Continuation

Date	Proceedings	Date Order or Judgment Note
4-04-75	CARLOS PEREZ--Filed defts. notice of appeal to the USCA from the final judgment entered on April 2, 1975 (copies mailed to the AUSA and to deft. at 427 West St,NYC, Federal Dep. of Detention) Deft. is granted leave to appeal in forma pauperis. Stewart,J.	
3-20-75	CARLOS PEREZ--Filed CJA copy #2 authorizing payment to Manuel Ras of 163-07 21st Ave.,Whitestone,Queens, $ 113?? for expert services as an interpreter as indicated. Original copy mailed to AO,Washington,DC for payment.	
3-20-75	CARLOS PEREZ--Filed CJA copy #5 authorizing payment to Manuel Ras for expert services as an interpreter, etc. Stewart,J.	
4-16-75	Both defts.--Filed notice that the [illegible] has been certified and transmitted to the [illegible] date.	
4-11-75	PEREZ ---Filed commitment and return. Deft. delivered to: Warden, FDH on 4/2/75.	
4-14-75	AURORA LABORY CARLOS PEREZ---Filed for both defts. papers recd. from the office of Mag. Raby: docket entry sheet, criminal complaint, SDNY,disposition sheet, appointment of counsel, temporary commitment and appearance bond forLABOY--in the amt. of $5,000 PRB secured by $500 cash.	
4-24-75	LABOY--Filed remand dated March 6,1975.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA : 74 CRIM. 1045

-v- : INDICTMENT

AURORA LABOY, a/k/a : 74 Cr.

CARLOS PEREZ, a/k/a :
"Charlie", a/k/a "Fernando" :

Defendants :

- x

The Grand Jury charges:

On or about the 14 day of March, 1974, in the Southern District of New York, AURORA LABOY, a/k/a "Cookie" and CARLOS PEREZ, a/k/a "Charlie", a/k/a "Fernando", the defendants, unlawfully intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 25.38 grams cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2)

[illegible]

[illegible]
United States Attorney

first convenient opportunity to interrupt this proceeding to bring the jury in which will take about two or three minutes.

MR. JACOBS: Your Honor, my name is Howard Jacobs. I was substituted in this case I believe about two weeks ago for the Legal Aid Society and I have discussed the case a number of times with the defendant.

I spoke to Mr. Salzman for the first time early this afternoon and informed him at that time that my client, the present intention of my client although it may change, was to testify in this case and that his testimony would implicate the co-defendant, Miss Laboy.

Mr. Salzman informed me at that time that if my client testified ans implicated Miss Laboy, that he felt that Miss Laboy would testify and implicate my client and exculpate herself.

I have tried a lot of cases and I don't think I have been faced with this situation before, where two defendants will testify and one will put the other one into it and the second one will say the first one did it. I think the only way these defendants could get anywhere near a fair trial is for severance and it is my application at this time for severance.

THE COURT: What do you think about that,

rkjw

Mr. Salzman?

MR. SALZMAN: Your Honor, I would join in that application so well stated by counsel.

MR. FLANNERY: Your Honor, it seems to me this is some kind of a fraud on the Court. I understand the appropriate function to challenge each other would be cross examination. I am somewhat surprised they would wait until the eve of trial to confer with each other about the case and I oppose the application, your Honor.

MR. SALZMAN: Your Honor, if Imay be heard with reference to the statement by the Assistant about waiting for the eve of trial to confer on this matter, there is an explanation for that.

Counsel was just substituted and until I walked into this courtroom today, I didn't know who counsel was who represented the co-defendant so I was unable to confer with him with reference to this matter. When prior counsel was representing the co-defendant, we had discussed the situation and that issue never came up.

MR. FLANNERY: Your Honor, if I may. Mr. Jacobs has been in this case for the past ten days. Mr. Greenberg was in prior to that. I would expect that counsel would have conferred by this time. I know on

several occasions I mentioned to Mr. Salzman that counsel had been substituted. There has been full discovery in this case.

I think the application at this time is a frivilous one and can be characterized in no other manner.

THE COURT: What do you think, Mr. Jacobs. Would it be feasible to take the government's evidence and then sever? That doesn't sound right to me.

MR. JACOBS: Your Honor would then have to grant a mistrial to one of the two defendants.

Your Honor, I think that I should have conferred with Mr. Salzman sooner but what are we facing. As far as the hearing goes, we are both involved in that and there wouldn't be any severance.

THE COURT: I suppose we could go ahead with the hearing.

MR. JACOBS: Absolutely. I am prepared to go first and I am prepared to follow right after the other trial. We are talking about a two-day trial, not some long lengthy thing. All we are talking about is the fact that the government would be put to the burden of producing their witnesses twice and instead of taking two days, it would take four days.

MR. FLANNERY: There is more than that. We

are talking about the possibility of inconsistent verdicts because people can take the stand and both give stories exculpating themselves without the benefit of cross examination.

I am surprised such an application is being made.

THE COURT: Suppose we sever, Mr. Flannery, you could have the testimony of each in each case.

Mr. Flannery, gentlemen, let's think about that. Why don't we plan to go ahead with the hearing now. I take it nobody objects to the hearing. As I understand it this is a hearing on audibility, is that correct?

MR. JACOBS: Yes, your Honor. There is a tape recording that the government wishes to offer into evidence. I have heard the recording. I could understand very little of it, your Honor, and it is our position that the tape is so bad that your Honor should hear it and determine whether we should burden the jury with this tape.

The government has had prepared a transcript of the tape. The tape is in English and Spanish. There is English speaking and Spanish speaking. Most of it, I would say your Honor, is in Spanish and I think we are

on or glanced at while the tape was being played was absent these four other matters discussed. Possibly it was the material you heard that was not in the transcript that has been added since this morning.

THE COURT: Are you saying that a new transcript has been prepared?

MR. FLANNERY: There are minor phrases throughout this transcript that we have been using today that are not in the transcript that you are using and we were going to bring these to the attention of counsel.

THE COURT: Those minor phrases were or were not in what I have.

MR. FLANNERY: They were not in the transcript and they are not major.

The other thing relates to the question of severance. When I spoke before about a fraud on the Court, what I perhaps did not so carefully articulate, is a situation that could occur if we have two separate trials with these two defendants. It is a matter of record now they intend to tell conflicting stories. It should be obvious that they cann't both be telling the truth.

To my knowledge there is no prejudice with the opportunity of cross examination for two defendants to have conflicting stories and to take the stand. The

possible fraud on the Court would be the result that in two separate trials we would have two different verdicts. I don't see why both defendants cannot be joined and tried together.

If counsel for the defense at this late date makes such an application, I think they should also bear the burden of supporting with legal authority such an application and the government would respond with a memo in the morning and be prepared to argue such an application prior to picking a jury.

THE COURT: I would be interested in seeing authority on this question of severance.

MR. JACOBS: I will look after the recess for this. I have never run across this before.

THE COURT: Do you have any authority, Mr. Salzman?

MR. SALZMAN: I do not.

THE COURT: I would like to get your authorities no later than the very first thing tomorrow morning.

MR. FLANNERY: I will make a note for the record that while one of the defendants, Mr. Perez is in jail and has made application that he proceed forthwith.

THE COURT: All right. I will expect whatever you have for me, all of you, by 9:00 o'clock tomorrow

[In the robing room:]

THE COURT: On this motion for a severance, Mr. Jacobs gave me a case yesterday afternoon. Do either you or Mr. Salzman have anything else you want to say to me about the severance problem?

MR. SALZMAN: There is nothing I have to say, your Honor.

MR. JACOBS: All I want to say, your Honor, is that the case I cited to your Honor involves prejudice to one defendant. As to the other authority that I found, I have agreed that the mass of authorities, most of the Judges, have held that it is not sufficient ground for a severance.

In none of those cases, your Honor, at least in my reading of some of them and in seeing the head notes in the others, did I ever run across a case where both defendants said that there would be prejudice. The normal situation is that one defendant says that, "I am going to be prejudiced because my co-defendant is going to testify against me."

I think that there is a different situation, a stronger situation for prejudice and I would urge that your Honor consider within your discretion to grant the motion to sever.

THE COURT: If we were to sever, would it be your view that in your case -- and you represent Perez, is that correct?

MR. JACOBS: Yes.

THE COURT: -- that the Government could subpoena Miss Laboy to testify in the Government's case.

MR. JACOBS: She, of course, has her rights under the Fifth Amendment, I would say.

THE COURT: Yes, obviously because of the pendancy of the other case against her.

MR. JACOBS: But, of course, when you reverse it, if my client were convicted or acquitted and then she went to trial, I believe my client would no longer have Fifth Amendment rights.

THE COURT: Yes. So, if she went first, in that situation it would present us with a real problem.

MR. FLANNERY: There is another possibility, and that is that one of the two defendants could be provided use immunity to testify at the trial and then after then after that trial, at the second trial, if there was a conviction there would be no difficulty. I would think from the defendants' standpoint that would be less favorable than both defendants going to trial together because --

THE COURT: Yes, that's true.

Have you, Mr. Jacobs and Mr. Salzman, received a copy of Mr. Flannery's memo?

MR. JACOBS: I have not.

MR. FLANNERY: I must apologize to the Court.

THE COURT: Have you got copies?

MR. FLANNERY: That is the only copy in existence. I had some mechanical difficulties this morning.

THE COURT: It seems to me that the problems you foresee, Mr. Jacobs and Mr. Salzman, certainly are conceivable, but on the whole I don't see at the moment that they aren't insurmountable. So I am going to deny the application for severance.

MR. JACOBS: Your Honor, I have one other application. I have been informed by the Court Reporter that the Government has ordered a daily copy of the transcript in this case. Both Mr. Salzman and I have been assigned under the Criminal Justice Act and I would apply for one transcript for the two of us, your Honor.

THE COURT: All right.

MR. JACOBS: Thank you.

MR. SALZMAN: I also have a further application, if I may, and I would like to preface it with a little background material. This is in relation to the recordings that we listened to yesterday.

CHARGE OF THE COURT

(Stewart, J.)

Ladies and gentlemen of the jury, we have now come to that part of the case where the evidence is in, the lawyers have presented their arguemtns and you are about to exercise your role, and that is to pass upon and decide the fact issues that are in this case.

First I want to express my thanks to each of you for your faithful devotion to your duties in this case. It is your responsibility to reach a just decision in the determination of the charge against the defendants. I know that you will deliberate towards reaching a verdict fairly, honestly and conscientiously.

As jurors I want to impress upon you that you are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you resolve such conflicts as there may be in the evidence, and you draw such reasonable inferences as may be warranted by the testimony or the exhibits in the case.

My function at this point is to instruct you on the law that is applicable to the case, and it is your sworn duty to accept the law, not what the lawyers may have said the law is but as I state it to you in these instructions, and to apply it to the facts as you find the facts

to be.

With respect to any fact matter, it is your recollection, and yours alone, that governs. Anything that counsel either for the Government or for the defendants may have said with respect to matters in evidence, whether during the trial in the form of a question, in argument, or in summation is not to be substituted for your own recollection of the evidence. So, too, anything that I may have said during the trial or may refer to during the course of these instructions as to any matters in evidence is not to be taken in place of your own recollection of the evidence.

As I have previously instructed you, the case must be decided upon the sworn testimony of the witnesses and those exhibits as have been received in evidence and the stipulations.

The fact that the Government is a party, that is, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that accorded to any other party to the litigation. And by the same token, it is entitled to no less consideration.

Before I get into my specific instructions, there are certain preliminary observations, certain principles

of law that are applicable in every criminal case, some of which I have already made reference to at the time of your selection as jurors.

First, remember that the indictment is simply an accusation, a charge. It is not evidence or proof of the guilt of a defendant. It is merely a means utilized by the Government to bring a defendant before the Court. It is nothing more or less, and you will not give any weight whatever to the fact that an indictment has been returned against these defendants.

Both defendants have pleaded not guilty. Therefore, the Government has the burden of proving beyond a reasonable doubt, by competent evidence, the charges made against them. Whether this burden is sustained doesn't depend upon the number of witnesses or the quantity of the testimony but rather on the nature and the quality of the testimony and other evidence. It is a burden that never shifts and remains upon the Government throughout the entire trial.

A defendant does not have to prove his innocence. On the contrary, a defendant is presumed to be innocent of the accusations contained in the indictment, and the Government must prove a defendant's guilt beyond a reasonable doubt.

As I told you at the start of the trial, this presumption of innocence was in the defendants' favor then, it was present during the entire course of the trial, it is in the defendants' favor now as I instruct you, and it remains in the defendants' favor during the course of your deliberations in the jury room.

It is removed only if and when you are satisfied that the Government has sustained its burden of proving the guilt of each of the two defendants beyond a reasonable doubt.

It is for this reason that a defendant does not need to take the witness stand. And in fact neither defendant in this case testified on their own behalf. You are not to draw any inference from a defendant's failure to do so, and in fact you must not speculate upon or consider it in any way in your deliberations.

A defendant has the absolute right not to make any defense and to rely upon the Government's burden to prove guilt beyond a reasonable doubt.

Now, before I read to you the indictment I want to explain to you how you are to determine the guilt or innocence of each of the two defendants named in the indictment.

There is, as you know, more than one defendant

in this case. You must bear in mind at all times that guilt is personal. The guilt or innocence of each of the defendants on trial before you must be determined separately, solely on the evidence presented against each defendant or the lack of evidence. The case of each defendant stands or falls upon the proof or lack of proof of the charge against that defendant and not against somebody else.

Therefore, please remember, as I read the indictment and explain the charges and the law to you, that you must consider the guilt or innocence of each of the two defendants separately. You should remember that if you find only one of the defendants guilty beyond a reasonable doubt, you must acquit the other defendant.

This conclusion is no more than a reemphasis of what I have told you. Each defendant must be judged on the evidence presented against that defendant.

The indictment in this case is a very short one. I will read it to you again to refresh your recollection as to the exact charge made by the grand jury against these two defendants:

"On or about the 14th day of March 1974, in the Southern District of New York, Aurora Laboy, also known as Cookie, and Carlos Perez, also known as Charlie, also known as Fernando, the defendants, unlawfully, intentionally,

and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit approximately 25.28 grams of cocaine hydrochloride.

The indictment, which charges Aurora Laboy and Carlos Perez with violating the federal narcotics laws, also recites the statutory sections upon which the charges are based. The Act which is applicable to the charges here is called the Controlled Substances Act, which became effective on May 1, 1971.

For your purposes it is not necessary for you to remember the specific act applicable here. It is sufficient if you remember the conduct which the Act forbids and the essential elements of the offenses here charges.

The term "controlled substances" in the indictment is used in the Act to refer to any drug included in one of five schedules contained in the Controlled Substances Act. Cocaine is included in one of those schedules, Schedule II. Among other things, it is made unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute any controlled substance such as cocaine.

Finally section 2 of Title 18 of the United States Code provides, and I am quoting: Whoever commits an offense against the United States or aids, abets, counsels, commands,

induces or procures its commission, is punishable as a principal."

Now, as I have indicated, the indictment charges Laboy and Perez, the defendants, with the distribution and possession with the intent to distribute 25.38 grams of cocaine. Before you can find one or both of these defendants guilty of the crime charged in the indictment, you must be convinced beyond a reasonable doubt that the Government has proved the following elements:

First, that on or about March 14, 1974 Laboy or Perez, the defendants, distributed and possessed with intent to distribute a narcotic drug controlled substance;

Second, that the defendant did so unlawfully, wilfully and knowingly.

If you find the first two elements beyond a reasonable doubt, then you must consider the third element, whether the substances which you have found one or both of the defendants to have unlawfully, wilfully and knowingly distributed and possessed with intent to distribute was in fact cocaine, as the indictment charges.

Now, I will consider each of those three elements. The first element of the offense is possession with intent to distribute the drug that is included within the first element. What does that phrase mean? Well,

the word "distribute" means the actual constructive or attempted transfer of the drug. The word "possess" has its common, everyday meaning. That means to have something within your control.

To have something within your control doesn't necessarily mean to have it in your hand or your pocket. "Control" may be demonstrated by the existence of a working relationship between the person having such control and the person with actual physical custody.

And the word "intent" refers to a person's state of mind. So the term "possess with intent to distribute" can be fairly stated to mean to have control over an item for the purpose that the item be transferred.

On this element, if you find beyond a reasonable doubt that one or both of these defendants knowingly transferred the drug and possessed the drug, and that at the time they possessed it their mental state was such that they would transfer it to someone else, then I charge you that such a transfer satisfies this requirement of the statute.

As to the second element, the terms "unlawfully, wilfully and knowingly" mean that you must satisfied beyond a reasonable doubt that each of the defendants knew what they were doing and that each acted deliberately and voluntarily as opposed to mistakenly or accidentally or as a

result of some coercion. It is not necessary that each of the defendants knew they were violating a particular law. Rather, it is sufficient if you are convinced beyond a reasonable doubt that each was aware of the general unlawful nature of their acts.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have to arrive at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances. In determining whether a defendant acted with such guilty knowledge or intent, you may consider the fact, if you find it true, that a defendant engaged in other transactions similar to those charged in the indictment. Further, you may consider proof of criminal activity similar to that included in the indictment to show the method or scheme employed by a defendant.

Turning now to the third element, the indictment charges that the narcotic drug controlled substance is

cocaine. I instruct you as a matter of law that cocaine is a narcotic drug controlled substance. However, if you find the first two elements proved beyond a reasonable doubt, you must still find, again beyond a reasonable doubt, that the substance which the defendants possessed and distributed was in fact cocaine, as charged in the indictment.

Just as with any other component of the crime the existence of and dealing in narcotics may be proved by circumstantial evidence. There need be no sample placed before the jury, nor need there be testimony by chemists as long as the evidence furnishes a basis for inferring the material in question was a prohibited narcotic drug.

The Government has introduced a stipulation between the Government and counsel for the defendants that the chemist who analyzed the substance covered in this indictment, if called as a witness to testify, would have stated that the substance was cocaine. This stipulation is Government Exhibit 5.

Finally, it is not necessary for the Government to show that a defendant physically committed the crime himself or herself. The United States Code provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he or she committed it himself.

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JG 1

Accordingly, for example, you may find both defendants guilty of the offense charged in the indictment if you find beyond a reasonable doubt that one defendant committed the offense as charged and the other defendant aided and abetted in the commission of that offense.

To determine whether one defendant aided and abetted the commission of the offense charged, you should ask yourself these questions: Did he or she participate in it as something he or she wished to bring about? Did he or she associate himself or herself with the venture? Did he or she seek by his or her actions to make it succeed?

If he or she did, then he or she is an aider and abetter and therefore guilty.

Now, I've used in my instructions several times the phrase "beyond a reasonable doubt." What is a reasonable doubt? A reasonable doubt is one which appeals to your reason, to your judgment, your common sense and your experience. It is not impulse, whim, speculation, it is not an excuse to avoid the performance of an unpleasant duty, nor sympathy for a defendant. On the contrary, it is a doubt which a reasonable person has after carefully weighing all the evidence.

A reasonable doubt may arise not only from the evidence presented but also from the lack of evidence, since

JG 2

the burden is always upon the prosecution to prove the defendant guilty of every essential element of the crime charged beyond a reasonable doubt.

The defendant has a right to rely upon the failure of the prosecution to establish every element beyond a reasonable doubt. If, after a fair and impartial consideration of all the evidence in the case or the lack of it, you can honestly say that you have such a doubt as would cause prudent persons to hesitate before acting in matters of importance to themselves, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

On the other hand, if, after a fair and impartial consideration of all the evidence, you can honestly say that you are convinced of the guilt of a defendant, with such conviction that you would be willing to act upon it in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and in that circumstance it is your duty to convict.

One final word on this subject. Beyond a reasonable doubt does not mean beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would be convicted. Consequently, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt.

JG 3

Of course, it follows that if after considering all the evidence in the case or the lack of evidence you find that the proof with respect to either defendant is as consistent with innocence as with guilt, or that it is only less likely that that defendant is innocent than guilty, that defendant should be acquitted.

If you find that the law has not been violated, you should not hesitate for any reason to find a verdict of not guilty. But, on the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or for any other reason to render a verdict of guilty.

There are two types of evidence which the jury, which you, may properly rely on in deciding the guilt or innocence of an accused. One is direct evidence, such as of a witness relating what he heard or saw, something he knows through his own knowledge which bears directly on a fact issue in the case. For example, testimony by a witness that he saw the defendant in possession of an object is direct evidence which, if believed by the jury, establishes the fact that the defendant was in possession of the object.

The other type of evidence is circumstantial evidence, which is proof of a fact or circumstance from which one may infer connected facts which reasonably fall

in your common experience. Circumstantial evidence is that which tends to prove a disputed fact through other facts. Here is a very simple example.

If you look out a window and see it's raining, then your statement that you see rain coming down is direct evidence that it is raining. But if instead of looking out the window you see a succession of people coming inside, each with raincoats, rubbers, umbrellas and each one dripping wet, then your statement as to that observation is circumstantial evidence of the fact that it is raining.

Circumstantial evidence is of no less value than direct evidence. As a general rule the law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant the jury must be satisfied of a defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In addition, there are times when different inferences may be drawn from a certain set of facts. An inference is a deduction or a conclusion which the jury is permitted to draw from facts which have been established by either the direct or circumstantial evidence in the case. But an inference is not drawn by speculation or guesswork. Rather, it must be arrived at by an exercise of your reasoning and your common sense.

So, while you are considering the evidence presented, you are permitted to draw from the facts which you find to have been proven such reasonable inferences as seem justified in the light of your experience. But here again let me remind you that whether based on direct or circumstantial evidence or the logical reasonable inferences drawn from such evidence, you must be satisfied of guilt beyond a reasonable doubt.

Turning to the credibility or believability of witnesses, you are the sole judges of the credibility or truthfulness of each witness in this case. In weighing the testimony of each witness you should consider his relationship to the Government, the extent of the witness' interest in the outcome of the case, the manner of testifying, his appearance, his conduct while on the witness stand, his intelligence, the strength or weakness of his recollection, the extent to which he has been corroborated or contradicted, if at all, by the other credible evidence. The ultimate question for you to decide is did the witness tell the truth. To this end you are to use your everyday common sense.

If you find that any witness has deliberately testified falsely to any material fact, you may disregard all of his testimony or you may accept that part of his testimony which you believe is truthful or which you find

to be corroborated or supported by other evidence in the case.

Evidence that a witness has been convicted in the past of certain crimes may be considered by you in determining the witness' credibility. By this I mean you may consider his prior convictions in determining a witness' worthiness of belief.

Now, there has been testimony before you with respect to the use by the narcotics agents of the Government service of an informant, an informer. In fact, one informant, Mr. Acevedo, was called by the Government as a witness.

Whatever you think of informers, whatever I may think of informers, the Government uses them in order to get leads to those who are violating the law. Whether you or I disapprove of that use is not relevant, because the use of such services is not forbidden by law. In fact, since criminal conduct is generally conducted in secrecy, if the Government did not use such testimony criminals might not be brought to justice.

Therefore you are not to disbelieve the testimony of Mr. Acevedo merely because he is deemed an informer. Rather, you should give it the same weight as you would give that of any other witness.

Putting it another way, if you are satisfied

beyond a reasonable doubt, as I have just defined reasonable doubt to you, that on the date and at the place with which we are concerned either or both of the defendants committed the offenses charged in the indictment, then you must find that defendant or both defendants guilty even though you believe apprehension came about in some measure by the Government availing itself of the services of an informer.

As I have mentioned to you before, anything that counsel either for the Government or the defense may have said with respect to matters of evidence both during the trial or in argument or in summation is not evidence in the case. So, too, anything which I may have said is not evidence.

The parties have from time to time throughout this trial raised objections to some of the testimony or other evidence, as I told you at the start of the trial they would. Again I want to tell you that it is the duty of a lawyer to object to evidence which he believes may not properly be offered, and you should not be prejudiced in any way against the lawyer who makes these objections.

In addition, the actions of the Court, my actions, during the trial in ruling on motions or on objections are not to be taken by you as any indication of the

guilt or innocence of the defendants. These are matters of procedure and law, with which you have no concern.

Under your oath as jurors, as I told you before, you cannot allow a consideration of the punishment which may be inflicted upon the defendant, upon either defendant, if convicted, to influence your verdict in any way or in any sense enter into your deliberations. The duty of imposing sentence rests exclusively with me, with the Court.

Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendants solely upon the basis of such evidence and the law as I have told it to you. You must not be influenced by any assumption, conjecture, sympathy or any inference not warranted by the facts.

The purpose of your deliberations is to exchange views with your fellow jurors, to discuss, consider the evidence, to listen to each other's arguments, to present your own views, and to reach a unanimous verdict as to the offense charged in the indictment, if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. Don't hesitate to reexamine your views and to change your opinion when,

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after a discussion, it appears to be in error. But if, after carefully considering all the evidence in the case and the arguments of your fellow jurors, you hold a conscientious view which differs from the others, you are not to yield your views simply because you are outnumbered.

If in the course of your deliberations you need to examine any of the exhibits or desire any of the testimony to be read, or if there is anything else which you need from me, such as the indictment or other matters, will you please send me, Mr. Foreman, through the Marshal, a note asking for whatever you want.

In communicating with me, I should admonish you, however, not to indicate in any communication which you send to me how your vote stands at that point in time.

As I've indicated, and I will repeat it once more, a verdict of either not guilty or guilty must be unanimous. You must render a verdict with respect to each of the two defendants.

Your oath sums up your duty, and that is, without fear or favor to anyone you will truly try the issues between these defendants and the Government based solely upon the evidence and my instructions as to the law. It is important to the Government; it is important to the defendants.

Counsel?